In the Supreme Court of the United States

OCTOBER TERM, 1924

ERIE COAL AND COKE CORPORATION, appellant
v.
THE UNITED STATES
No. 78

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

The plaintiff (appellant) brought suit in the Court of Claims to recover $1,208,370.00 as damages for alleged breach of contract by the War Department in refusing to deliver 29,500 tons of sodium nitrate, which it claimed to have purchased at an auction sale conducted by that Department. The aggregate amount of its bids was $711,500.00, and the fair market value of the nitrate, as alleged in the petition, was $1,919,870.00, the difference being the amount which the plaintiff claimed it was entitled to recover.

The plaintiff's bid was, therefore, about 37 per cent of the fair market value of the property, and the Secretary of War refused to carry out the sale, on the ground that the price was inadequate.

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The Court of Claims sustained the demurrer of the United States, on the ground that the petition did not allege a cause of action, and entered judgment dismissing the petition.

THE FACTS

It is alleged in the petition that the sale was made pursuant to the Army Appropriation Act (Act of July 11, 1919, c. 8, 41 Stat. 104, 105). The first paragraph of that Act provided that—

> in addition to the delivery of the property heretofore authorized to be delivered to the Public Health Service, the Department of Agriculture and the Post Office Department of the Government, the Secretary of War be, and he is hereby, authorized to sell any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government for the use of the War Department to any State or municipal subdivision thereof, or to any corporation or individual upon such terms as may be deemed best.

The petition sets forth separate causes of action for separate lots of the nitrate located at different places. They are all based upon substantially the same allegations and may be summarized briefly as follows:

That the Secretary of War caused to be published and circulated an advertisement (Claimant's Exhibit A, p. 10) for the sale at public auction on April 13, 1922, at the War Department in Washington, of

40,000 tons of sodium nitrate. At the time and place appointed, the nitrate was offered for sale, and the plaintiff bid for three lots, bidding $25 per ton for two of the lots and $22.50 per ton for the third. The plaintiff was the highest bidder, and the auctioneer knocked down the goods to the Plaintiff.

Plaintiff thereupon deposited with the Ordnance Department bonds and certificate of deposit of the value of more than 10 per cent of the price paid; that the Ordnance Department accepted such deposits; that the plaintiff held itself ready and willing to do and perform all the terms, conditions, and undertakings by it agreed to be performed, and demanded that the Secretary of War sign and enter into a written contract to sell pursuant to the terms set forth in the circular (Claimant's Exhibit B, page 11); that the Secretary of War refused to execute such written agreement upon the ground that the prices paid were inadequate; that the bonds and certificate of deposit were returned to and accepted by the plaintiff without prejudice to any of its claims or rights against the United States, and that the difference between the fair market value of the sodium nitrate and the price bid was the sum of $1,208,370.00.

It was provided in the terms and conditions of the sale (Plaintiff's Exhibit B, page 13) that—

> Acceptance by the Government of any bid will not be final until the execution of a contract and bond and upon failure by the purchaser within ten days after notice of the acceptance of his bid to execute said contract

the Government may withdraw such acceptance and make such disposition of said nitrate as it may desire, etc.

* * * * *

Contracts will be prepared and administered for the United States by the Philadelphia District Office of the Ordnance Salvage Board. No assignment of the contract or the bill of sale of the property awarded will be permitted without written consent of the United States through the Ordnance Salvage Board.

* * * * *

Purchaser will be required upon acceptance of his bid and before delivery of nitrate to enter into a written contract embodying the following terms, and to give a bond in double the amount of his bid, with surety acceptable to the Secretary of War, conditioned upon the faithful performance of the terms of said contract.

Government at its election may rescind said sale at any time before August 1, 1922, in which event the purchaser shall immediately, and not later than November 30, 1922, at his own expense, deliver to the Government f. o. b. cars, at Savanna Proving Grounds, Illinois, sodium nitrate in equal quantity with that theretofore delivered by the Government to purchaser, and of the following specifications: * * * and the Government shall return to purchaser all money theretofore received in payment for such nitrates, and relieve him from any obligation for further payments.

ARGUMENT

There was no binding contract between the appellant and the United States

The conditions set forth in the advertisement and in the circular (Claimant's Exhibit B) show clearly that under the announced plan of sale no binding obligation was incurred by the Government until a written contract had been entered into as a consummation of the transaction.

Only the Secretary of War was authorized by the statute to sell, and the terms were such as he deemed best. He alone could bind the Government, by the acceptance of the bid, and until accepted by him the bids could be rejected by him.

This was in accordance with the requirements of Section 3744 of the Revised Statutes, which requires contracts made by the Secretary of War to be in writing and signed by the parties at the end thereof, and the conditions of this sale clearly show an intention to fully comply with this section.

The Secretary of War had no authority to complete any such transaction as this without a full compliance with the statute, and until the formalities therein required had been fully complied with no contract or obligation on the part of the United States existed. Such was the conclusion of the Acting Attorney General in advising the Secretary of War upon this transaction (33 Op. A. G. 400).

Such is the law, as settled by the decisions of this Court.

Clark v. *United States*, 95 U. S. 539.

South Boston Iron Co. v. *United States*, 118 U. S. 37.

Monroe v. *United States*, 184 U. S. 524.

St. Louis Hay and Grain Co. v. *United States*, 191 U. S. 159.

In the *Monroe case* (184 U. S. 524) it appeared that the United States, through Captain Marshall of the Corps of Engineers, had advertised for proposals for constructing a canal. The plaintiffs submitted a bid, and that bid was accepted by Captain Marshall, acting under an authority contained in a letter from the Chief of Engineers of the United States Army. Thereafter, Captain Marshall forwarded to the plaintiffs a formal contract and bond to be executed within ten days, which plaintiffs executed and returned, and which were duly signed by Captain Marshall. The form of contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases. Upon receiving notice of the acceptance of their bid the claimants began preparation for the work and did a considerable amount of preliminary work. Thereafter, and without fault on their part, and while the work was progressing, they were stopped by the United States and their contract abrogated, and the work which they had contracted to do readvertised, for the alleged reason that by the Act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract restricting a contractor not to have his workmen labor more than

eight hours a day. The contract contained a provision that it should be subject to the approval of the Chief of Engineers of the United States Army. The contractors thereupon sued in the Court of Claims for expenses incurred and for prospective profits.

The Court of Claims dismissed the petition and, upon appeal to this Court, its judgment was affirmed.

The contractors claimed that the advertisement, the bid, the submission thereof to the Chief of Engineers, his direction that it be accepted, the preparation of the formal contract on the blank furnished by the Chief of Engineers, and its execution by the officer in charge, constituted an approval. In delivering the opinion of this Court Mr. Justice McKenna said at page 527:

> We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the Chief of Engineers. The approval was to be a future act. The provision of the contract was: "This contract" (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) "shall be subject to approval of the Chief of Engineers of the United States Army." The approval, therefore, did not consist of something precedent, but was to consist of something subsequent.

> That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved on the Chief of Engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that it was idle.

In *South Boston Iron Company* v. *United States*, 118 U. S. 37, plaintiffs offered to construct new boilers for certain vessels of the Navy. By direction of the Secretary of the Navy, the offer was accepted in a letter signed by the Chief of the Bureau of Steam Engineering. Apparently performance was then begun, for shortly afterwards the Secretary notified the plaintiffs to discontinue work. Suit was brought in the Court of Claims, which dismissed the petition upon the ground that no contract has been executed in accordance with Section 3744, R. S. In affirming that judgment, this Court, by Mr. Chief Justice Waite, said, at page 42:

> An effort has been made in this case to show a contract in writing, but we agree entirely

> with the Court of Claims that the papers relied on for that purpose are nothing more in law or in fact that the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound. Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so.

In *Clark* v. *United States*, 95 U. S. 539, this Court, referring to this provision of law, said, at page 541:

> The Court of Claims has heretofore held the Act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive.

The Court of Claims has consistently followed this principle.

> *McLaughlin & Co.* v. *United States*, 36 Ct. Cls. 138.
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> *Gillespie's Case*, 47 Ct. Cls. 310.
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> *American Dredging Co.* v. *United States*, 49 Ct. Cls. 350.
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> *St. Louis Hay & Grain Co.'s case*, 37 Ct. Cls. 281.

In affirming the latter case, 191 U. S. 159, Mr. Justice Holmes, writing for the Court, said, at page 163:

> Although, no doubt, both parties supposed their agreement binding, the Court of Claims held, and it is not disputed, that the contract was within Rev. Stat. § 3744, and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed. *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Co.* v. *United States*, 118 U. S. 37. See *Monroe* v. *United States*, 184 U. S. 524. It is argued by the claimant on this ground that it is entitled to maintain a *quantum valebat*.

Mr. Justice Holmes then points out that the "invalidity of the contract is immaterial after it has been performed," a principle not involved here, and in answer to the contention that the failure to reduce the contract to writing was the fault of the officers of the Government, said, page 163:

> Of course, different considerations would come in if the claimant had been subjected to a motive from which it had a right to be free, as, for instance, by fraud or duress. But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the Government to see that the contract was put in binding form, is very far from making out an analogy to fraud. The claimant was bound to know the law at its peril.

It is to be noticed that the only officer authorized by the Act to make the sale was the Secretary of War. While he doubtless had discretion as to the manner in which bids should be obtained, the acceptance of the bid, the actual consummation of the sale was a matter solely within his power. He never approved the sale. On the contrary he rejected the plaintiffs' bid for its obvious inadequacy. An officer of the Government, charged with responsibility for its property, could hardly excuse or justify his act, had he sold Government property worth almost $2,000,000 for a little over $700,000, even though one of his subordinates had gone through the form of accepting the bid. Aside from the provision of Section 3744, R. S., sales under such a statute as we have here, should be regarded as analogous to judicial sales at auction, where the final power to confirm or set aside is always in the court. They afford a convenient method of obtaining bids, and do not effect a sale until confirmed.

The conditions of sale already set forth plainly contemplated not merely a written contract as required by law, but a more formal acceptance of the bid than the fall of the auctioneer's hammer. "Acceptance by the Government of any bid" was not to be final until the execution of a contract and bond, which was to be executed within ten days after "notice of the acceptance" of the bid, not ten days after the auctioneer had acted. The bid then tentatively accepted was to be submitted to the Secretary, and, if accepted by him, the bidder was to be given ten days

notice to execute the contract and bond. To hold that the action of the auctioneer was final would be to divest the Secretary of the responsibility and discretion conferred upon him by the statute.

There is another consideration which should be noticed. One of the terms of sale which was to be incorporated into the contract was a provision that the Government, at its election, might rescind the sale at any time before August 1, 1922, in which event the purchaser should immediately deliver to the Government sodium nitrate in equal quantity with that theretofore delivered by the Government to the purchaser.

Irrespective of any other considerations, this provision, in its practical effect, would give the Government the right to revoke, rescind or annul the sale—call it what you will—at any time.

From a practical standpoint, there would seem to be no difference between the reservation of a right in the Secretary of War to refuse to accept a bid and his right to accept the bid and in the next minute rescind the sale.

The cases of *Garfielde* v. *United States* (93 U. S. 242) and *United States* v. *Purcell Envelope Company* (249 U. S. 313) are not in point.

In the first place, Section 3744 of the Revised Statutes does not apply to the Post Office Department. It applies only to contracts made by the Secretary of War, Secretary of the Navy, and the Secretary of the Interior.

Furthermore, in the *Garfielde case*, the proposal made by Garfielde was accepted by the Postmaster General. In the *Purcell Envelope Company case* the proposal was accepted and a formal order entered awarding the contract to that company.

The suit arose over the attempt of a subsequent Postmaster General to cancel the contract made by his predecessor.

In the present case, in addition to the provisions of Section 3744 of the Revised Statutes and the other considerations mentioned, we have the fact that the Secretary of War, in whose discretion the statute vested the authority to sell, not only did not accept the bid, but rejected it upon the meritorious ground of its patent inadequacy.

There is no allegation that the Secretary acted fraudulently or in bad faith or from any unworthy motive.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
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SEPTEMBER, 1924.

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